

<u>Citation</u>	<u>Crime charged</u>	<u>Description of unconstitutionally obtained statements</u>
People v. Mora, 237 Cal.App.2d 770, 47 Cal.Rptr. 337, 340-341 (1965)	possession of heroin	statements as to source of heroin.
People v. Tagle, 238 Cal.App.2d 16, 47 Cal.Rptr. 434, 436-439 (1965)	murder	admission that defendant un- intentionally fired shots that killed deceased.
People v. Breen, 238 Cal.App.2d 164, 47 Cal.Rptr. 644 (1966)	murder	damaging admissions and con- fession of guilt on associated accessory charge.
People v. Gilbert, 63 Cal.2d 960, 47 Cal.Rptr. 909, 915-916, 408 P.2d 365 (1966), <i>cert. granted</i> , — U.S. —	murder, robbery, kidnapping	admissions of guilty knowl- edge by codefendant.
People v. Rodriguez, 238 Cal.App.2d 682, 48 Cal.Rptr. 117, 120 (1965)	possession of heroin for sale	exculpatory statements.
People v. Nerger, 238 Cal.App.2d 716, 48 Cal.Rptr. 148 (1965)	illegal dispensation of narcotics	admissions to "helping" peo- ple by furnishing certain nar- cotics.
People v. Garcia, 239 A.C.A. 51, 48 Cal.Rptr. 305 (1966)	possession of heroin	confession of defendant's wife, a codefendant.
People v. Smith, 63 Cal.2d 779, 48 Cal.Rptr. 382, 409 P.2d 222 (1966)	conspiracy, murder, attempted murder	admissions of one codefendant and confession of second co- defendant as against third defendant.
People v. Williams, 239 A.C.A. 35, 37 48 Cal.Rptr. 421 (1965)	armed robbery	codefendant's confessions (court trial).
People v. Thomsen, 239 A.C.A. 78, 88-89, 48 Cal.Rptr. 455 (1965)	robbery and conspiracy	exculpatory explanations; ad- missions of association with the robbers.

Citation	Crime charged	Description of unconstitutionally obtained statements
People v. Brice, 239 A.C.A. 196, 48 Cal.Rptr. 562, 567-571 (1966)	burglary	"clearly and tellingly incriminating" statement.
People v. La Vergne, 64 A.C.A. 275, 49 Cal.Rptr. 557, 560, 411 P.2d 309 (1966)	murder, robbery, and assault	exculpatory statements.
People v. Sylvester, 241 A.C.A. 46, 50 Cal.Rptr. 263, 266 (1966)	narcotics sale	"that's all there was" in response to question where the rest of the "stuff" (heroin) was.
People v. Crenshaw, 241 A.C.A. 381, 50 Cal.Rptr. 429, 434 (1966)	robbery	admission that victim "was one of his whores" required reversal of pimping conviction but not robbery conviction.
People v. Helms, 242 A.C.A. 528, 532, 536-537 (1966)	robbery, burglary, and assault	conflicting stories and admissions.

UNCONSTITUTIONAL COMMENT OR INSTRUCTION ON DEFENDANT'S FAILURE TO TESTIFY IN VIOLATION OF *GRIFFIN V. CALIFORNIA*, 380 U.S. 609 (1965)

Respondent, in its brief (p. 24) in *Chapman v. California*, No. 95, cites cases herein listed after a statement that "there is no question but that California courts have applied their harmless error rule to alleged constitutional errors such as a violation of the comment rule in a myriad of both reported and unreported cases." The citations only are included in this list without further description because the prohibited comments or instructions are generally so similar in the various cases.

*People v. Luckman*, 235 Cal.App.2d 75, 45 Cal.Rptr. 41, 44 (1965).

*People v. Parker*, 235 Cal.App.2d 100, 44 Cal.Rptr. 909, 912-13 (1965)

*People v. Davis*, 235 Cal.App.2d 214, 45 Cal.Rptr. 297 (1965)

*People v. Wozniak*, 235 Cal.App.2d 243, 45 Cal.Rptr. 222, 236-237 (1965)

*People v. Dougherty*, 235 Cal.App.2d 564, 45 Cal.Rptr. 528, 530 (1965)

*People v. Propp*, 235 Cal.App.2d 619, 45 Cal.Rptr. 690, 706-707 (1965)

*People v. Erb*, 235 Cal.App.2d 650, 45 Cal.Rptr. 503, 507-08 (1965)

*People v. Estrada*, 236 Cal.App.2d 221, 45 Cal.Rptr. 904 (1965)

(conviction reversed on other grounds)

*People v. De Leon*, 236 Cal.App.2d 530, 46 Cal.Rptr. 241, 242 (1965)

*People v. Huggins*, 236 Cal.App.2d 578, 46 Cal.Rptr. 199 (1965)

*People v. Butts*, 236 Cal.App.2d 817, 46 Cal.Rptr. 362 (1965)

(murder count only)

- People v. Collier, 237 Cal.App.2d 259, 46 Cal.Rptr.  
 887, 890 (1965)  
 (as to defendant Collier)  
 People v. Fontaine, 237 Cal.App.2d 320, 46 Cal.  
 Rptr. 855, 865 (1965)  
 People v. Boyden, 237 Cal.App.2d 695, 47 Cal.  
 Rptr. 136, 139 (1965)  
 People v. Cockrell, 63 Cal.2d 659, 47 Cal.Rptr. 788,  
 408 P.2d 116 (1965)  
 (silence as admission)  
 People v. Padilla, 240 A.C.A. 115, 49 Cal.Rptr. 340  
 (1966)  
 People v. Phillips, 240 A.C.A. 206, 49 Cal.Rptr.  
 480, 484 (1966)  
 People v. Bowman, 240 A.C.A. 360, 49 Cal.Rptr.  
 772 (1966)  
 People v. Potter, 240 A.C.A. 687, 49 Cal.Rptr. 892,  
 899 (1966)  
 People v. Culp, 241 A.C.A. 445, 50 Cal.Rptr. 471  
 (1966)  
 People v. Helms, 242 A.C.A. 528, 537, 51 Cal.  
 Rptr. 484 (1966)  
 People v. Gills, 241 A.C.A. 868, 50 Cal.Rptr. 822  
 (1966)  
 People v. Romero, 244 A.C.A. 564 (1966)

## APPENDIX B

### **Summary of the History, Purpose, and Principal Interpretations of the Harmless Error Rule of the California Constitution**

The harmless error rule of the California Constitution is that:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." Calif. Const. Art. VI, §4½.

The history, purpose, and principal California interpretations of the foregoing rule are as follows:

In 1906, Roscoe Pound, in a far reaching paper before the American Bar Association, stated that "the worst feature of American procedure is the lavish granting of new trials". Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ABA Rep. Pt. 1, 395, 413 (1906). See also 33 ABA Rep. 542, 545, n.1 (1908) (bibliography of other contemporary criticism).

Dean Pound's criticism prompted the ABA in 1907 to establish a Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation. See 31 ABA Rep. 505 (1907).

In 1908, the ABA Special Committee recommended that the following federal statute be enacted:

"No judgment shall be set aside, or new trial granted, by any court of the United States, in any case, civil or criminal, on the ground of misdirection of the jury

or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court to which application is made after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." 33 ABA Rep. 542, 550 (1908).<sup>1</sup>

The special committee's position at all times was that a court "decision should be according to the law of the land. But it should be no part of this law that every technical departure from a rule of practice or evidence should compel a new trial." 33 ABA Rep. at 544.

With ABA approval, 33 ABA Rep. 27, 33 (1908), the proposed statute was introduced in Congress in 1908, see 34 ABA Rep. 578, 579 (1909), and reintroduced, after minor modification in 1909. S. 4568, H.R. 14,552.<sup>2</sup> The ABA filed a supporting brief with the Congressional committees hearing the bill. The brief stated that the purpose of the bill was to stop "reversals for technical defects in the procedure below" and that its effect would be "to enact that the presumption shall be that the decision below was right," and that if it was erroneous in some detail the error did not affect the result. 35 ABA Rep. 624 (1910).

Contemporaneously with the introduction of and hearings on the ABA "technical error" bill in Congress, the 1911 California Legislature, at the instance of State Senator A. E. Boynton, proposed the following amendment to the California Constitution:

"No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of

<sup>1</sup> The language used was suggested by Order 29, Rule 6, of the Rules of the English Supreme Court of Judicature. See 35 ABA Rep. 614, 615 (1910).

<sup>2</sup> The modification, after hearings on the original proposal, was to delete the word "affirmatively" in the phrase "affirmatively appear that the error complained of resulted in a miscarriage of justice." 34 ABA Rep. 603, 61, 81 (1909).

the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." 2 Calif. Stats. 1911, Res. ch. 36, p. 1798 (Sen. Const. Amdt. No. 26).

In describing the amendment, the California Supreme Court has stated that "while it had long been provided in our statutory law that judgments would not be reversed because of technical errors or defects which did not affect the substantial rights of the defendant (Pen. Code §§ 1258, 1404),<sup>3</sup> the courts nevertheless in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error and upon that basis the defendant was 'entitled to a reversal of the judgment' . . . . [Citations omitted]. The constitutional amendment added a new concept calling for a determination by the court that the alleged error resulted in a 'miscarriage of justice.'" *People v. Watson*, 46 Cal.2d 818, 834, 299 P.2d 243 (1956).

In the official arguments to the voters,<sup>4</sup> Senator Boynton stated that: "The object of this amendment is to enable our

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<sup>3</sup> Footnote not in original.

California had adopted a technical error statute as early as 1850: "After hearing the appeal, the court shall give judgment without regard to technical error or defect, which do not affect the substantial rights of the parties." Calif. Stats. 1849-50, ch. 119, §531, p. 314. The foregoing statute was repealed in 1851 and a virtually identical statute was substituted. Calif. Stats. 1851, ch. 29, §§499, 696, p. 267. The statute was codified in the California Penal Code of 1872 and then provided and now provides that "after hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties." §1258.

<sup>4</sup> Arguments to the voters in California are important interpretive aids. *E.g., Baumbaugh v. County of San Diego*, 44 Cal.App.2d 898, 902, 113 P.2d 218 (1941). The arguments on Section 4½ are reprinted in full at the end of this Appendix.

courts of last resort to sustain verdicts in criminal cases unless there has been a miscarriage of justice, or, putting it in another way, its purpose is to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors . . . . The necessity for this amendment lies in the fact that the constitution of California gives the courts of appeal and the supreme court jurisdiction, in criminal cases on appeal, on questions of law only. The reviewing power does not extend to questions of fact. In order to enable the higher courts to determine whether the errors committed by the trial court resulted in a miscarriage of justice, they must have the power to review the facts of the particular case."

Senator Boynton was aiming at such "purely technical points", *ibid.*, as the following: "In Missouri a case was reversed and the prisoner escaped conviction because the indictment alleged the deceased 'instantly died' instead of charging according to the ancient formula that he 'did then and there die.' In a Texas case the elimination of the letter 'r' from the word 'first' saved a murderer from the gallows, when his guilt was absolutely determined. In our own state a conviction for murder was set aside because the indictment failed to state that the man killed was a human being." *Ibid.*

Senator Birdsall also made clear in his supporting argument to the voters that the object of the amendment was to prevent reversals for such errors as omissions of a letter or unimportant word in an indictment, or "trifling inaccuracies" in rulings on evidence.

The California amendment was adopted by the voters on October 10, 1911. Its federal counterpart<sup>5</sup> was adopted by Congress in 1919 (40 Stats. 1181). In *Kotteakos v. United*

<sup>5</sup> 28 U.S.C. §2111 now provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

F.R. Crim. Proc. §52(a) provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

*States*, 328 U.S. 750, 758-69 (1946), the Court held that the federal harmless error rule did not excuse a variance between an indictment for one conspiracy and proof of several separate conspiracies. It carefully reviewed the history of the harmless error proposals originating with the ABA, and stated that "if, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress." 328 U.S. at 764-65.

The foregoing history demonstrates that no case can be made that a purpose of the amendment was to authorize California courts to dismiss violations of the United States Constitution as harmless.

The first important case under the new amendment was *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (1913). O'Bryan had testified before the grand jury without being given the required prior warning of his state constitutional privilege not to incriminate himself. The grand jury testimony was nevertheless admitted at his trial for murder, O'Bryan was convicted and his conviction was affirmed by the California Supreme Court. Three judges stated that "it is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected," 165 Cal. at 65, but that any error affecting the defendant's privilege under the state constitution was harmless. Three other judges refused to concur in any statement that a violation of a constitutional right could be harmless but held that any error was cured when the defendant voluntarily repeated the same testimony at the trial. 165 Cal. at 68-70. Chief Justice Beatty did not participate. The split of the court and the non-participation of the Chief Justice left "the scope of the amendment, especially in regard to constitutional rights, . . . still open," Kidd, A.M., Note, 1 Calif. L. Rev. 375, 377 (1913). Furthermore, no federal constitutional rights was

then involved. *Twining v. New Jersey*, 211 U.S. 78 (1908). Compare *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Griffin v. California*, 380 U.S. 609 (1965).

In 1914, section 41½ was amended to apply to civil cases as well as criminal cases and to clarify language relating to errors of pleading and procedure. See Calif. Stats. 1913, Res. ch. 48, p. 1681 (Sen. Const. Amdt. No. 12). Section 41½ now reads as quoted at the beginning of this summary.

In 1927, in *People v. Mahoney*, 201 Cal. 618, 627, 258 Pac. 607 (1927), the California Supreme Court made clear that "the fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice." The Court held that "in this case the defendant did not have the fair trial guaranteed to him by law and the constitution" because of the trial court's persistence in making disparaging comments. The Court accordingly reversed the judgment of conviction.

In 1945, in *People v. Sarazzawski*, 27 Cal.2d 7, 10-11, 161 P.2d 934 (1945), there was "no question that the evidence amply supports the verdict and judgment." The California Supreme Court, however, reversed, because "we find in the record several incidents which should not have occurred in a fair and orderly trial," namely the court's failure to stand by its representation that the defendant's new trial motion would be heard on a certain date and its instruction to the jurors during voir dire that they could keep mistakes in their answers secret. The Court again stated and followed the fundamental principle established in a line of prior California cases that "When a defendant has been denied any essential element of a fair trial, or due process, even the broad saving provisions of section 41½ of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand . . . [Citations]." 27 Cal.2d at 11.

In 1951, the California Supreme Court assumed that the evidentiary use of an involuntary confession could be harmless, *People v. Stroble*, 36 Cal.2d 615, 623-24, 226

P.2d 330, but its position on this point was short-lived and rejected by the United States Supreme Court. *Stroble v. California*, 343 U.S. 181, 190 (1952).

Shortly after the *Stroble* case, the California Supreme Court, in *People v. McKay*, 37 Cal.2d 792, 798-800, 236 P.2d 236 (1951), held that section 4½ did not justify affirmance of convictions obtained in a county where the defendants had suffered unfair pretrial publicity even though there was "abundant evidence of guilt." The Court stated that "regardless of their guilt, however, they were entitled to a fair and impartial trial." 37 Cal.2d at 798.

In 1955, a thoroughly and scholarly analysis of the cases under section 4½ concluded that "there are matters which the appellate courts have excluded from the scope of the section. Article VI, section 4½ was never intended to abrogate, modify, lessen or otherwise imperil the fundamental liberties or rights of a citizen of the State of California." Stout, *Appellate Review of Criminal Convictions*, 43 Calif. L. Rev. 381, 388 (1955). At the time of this analysis, California had only recently adopted the exclusionary rule as a rule of evidence and not of constitutional law in illegal evidence cases. *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905 (1955), and no experience was available under the harmless error rule for such cases.\*

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\* Later in 1955, however, the California Supreme Court reversed a defendant's convictions on two counts of extortion and one count of conspiracy because of the admission of illegally seized evidence as to those counts but affirmed the conviction on an additional extortion count on the grounds (1) that "the evidence, entirely independent of that illegally obtained, convincingly, if not overwhelmingly, establishes guilt," *People v. Tarantino*, 45 Cal.2d 590, 595, 290 P.2d 505 (1955) and (2) that the jury was presumed to have followed the court's instructions to keep the evidence separate as to each count, 45 Cal.2d at 597. Three justices dissented on the ground that the admission of the illegally obtained evidence was prejudicial on all counts. 45 Cal.2d at 604.

Since the exclusionary rule was then treated as a rule of evidence, however, rather than a constitutional rule, *People v. Cahan*, *supra*, 44 Cal.2d at 450-51, the *Tarantino* decision did not purport to hold that a violation of the United States Constitution could be dismissed as harmless. Furthermore, the reliance of the Court on the then

In 1956, the California Supreme Court, in one of the leading cases under section 4½, adopted the rule "that a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. \* \* \* [T]he test . . . , must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." *People v. Watson*, 46 Cal.2d 818, 836-37, 299 P.2d 243 (1956). The Court did not decide the applicability of section 4½ to violations of the United States Constitution but in reviewing the history it referred in dictum to the notion of the three judges in the 1913 *O'Bryan* case, *supra*, "that not every invasion of a constitutional right necessarily requires a reversal." 46 Cal.2d at 835.

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applicable analogy of error being prejudicial to one defendant but not to a codefendant has been cast in doubt by *People v. Aranda*, 63 Cal.2d 518, 524-27, 47 Cal.Rptr. 353, 407 P.2d 265 (1965) which held that error in admitting A's confession was prejudicial to his codefendant B even though the trial court had instructed the jury to consider the confession only against A.

"Much of the history of the California rule is reviewed in Justice Peters' opinion for the California District Court of Appeal in the *Watson* case, 288 P.2d 184 (1955) prior to the granting of a hearing by the California Supreme Court. The District Court of Appeal also stated that section 4½ "did not expressly or impliedly repeal other relevant sections of the Constitution. The fair trial and due process provisions of our Constitution, Art. I, § 13, of Cal. Const., cannot be ignored. The right, the constitutional right, to a fair trial is a right of the guilty as well as of the innocent. Of course, if a defendant commits a crime, he should be punished. But he should only be punished after having been convicted at a trial at which admissible evidence has been introduced before a jury, and after that admissible evidence has been evaluated by a jury in a fair trial. That is a fundamental concept in our system of law, one of the basic decencies that exists in our society in the relationship we

The probability test of the *Watson* case was a throwback to the personal viewpoint of Chief Justice Beatty in an earlier case that a miscarriage of justice "can only mean" the "conviction of a person who is probably innocent. For an opinion on a question of fact—the question of guilt or innocence of which we are given jurisdiction by the amendment—must have at least a probability to support it, not necessarily demonstration, of course, but necessarily the weight of the evidence." *People v. Fleming*, 166 Cal. 357, 384-85, 136 Pac. 291 (1913) (qualified concurring opinion). In the *Fleming* case, Chief Justice Beatty "never found the time to read the forty-four hundred pages of typewritten record even in the most cursory manner." *Ibid*.

The foregoing history reveals that although the California Supreme Court in dictum had indulged in the notion that a violation of constitutional rights could be dismissed

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have developed between government and the individual. A lawful inquiry into guilt or innocence, even that of an evil individual, cannot be permitted to degenerate into the unlawful process of permitting the prosecution to introduce inadmissible evidence materially and adversely reflecting upon the defendant, and then escape the effect of the error by the claim that such error was not prejudicial, because, forsooth, the admissible evidence sustains the conviction, and the appellate court cannot say with conviction that the defendant is innocent. If we are to give more than lip service to the constitutional guarantees of a fair trial and due process it must be the law that, where error appears, a defendant is entitled to a new trial unless the appellate court can say, with conviction, that the error, reasonably, could not have affected the verdict. Any other rule would deny to the defendant that fair trial that is inherent in our concept of due process of law." 288 P.2d at 194-95.

It should be noted that in *People v. Bostick*, 62 Cal.2d 820, 826, 44 Cal. Rptr. 649, 402 P.2d 529 (1965), Justice Peters later stated that California courts had held that erroneous denials of constitutional guarantees did not require reversal when not deemed prejudicial. The *Parham* case cited had by then established that proposition but the other cases cited did not involve an express denial of federal constitutional rights, e.g., *People v. Isby*, 30 Cal.2d 879, 894, 186 P.2d 405 (1947), and in some instances had preceded the adoption of section 4½. E.g., *People v. O'Brien*, 88 Cal. 483, 489-490, 26 Pac. 362 (1891).

as harmless and that individual justices had supported that view, the Court in its actual effective holdings, as in the *Mahoney*, *Sarazzawski* and *McKay* cases, had been faithful to the Constitution. When met squarely with the issue, the Court had refused to allow a violation of the Constitution to be dismissed as harmless.

The position of the California Supreme Court was reaffirmed again in 1963, when it reversed a murder conviction because the trial court had erroneously refused to give a manslaughter instruction despite evidence that would warrant a conviction of manslaughter and had thereby deprived the defendant of his "constitutional right to have the jury determine every material issue presented by the evidence." *People v. Modesto*, 59 Cal.2d 722, 730, 31 Cal. Rptr. 255, 230, 382 P.2d 33 (1963). The Court held that "regardless of how overwhelming the evidence of guilt may be, the denial of such a fundamental right cannot be cured by article VI, section 4½, of the California Constitution, for the denial of such a right itself is a miscarriage of justice within the meaning of that provision." *Ibid.*

Only a few months later, however, the California Supreme Court departed from the history and purpose of the California amendment and its own long-established position that the denial of a fundamental constitutional right is itself a miscarriage of justice. On September 12, 1963, despite the decision of the United States Supreme Court that the exclusionary rule for illegal evidence cases is a federal constitutional rule binding on the states, *Mapp v. Ohio*, 367 U.S. 643 (1961), the California Supreme Court bluntly and audaciously ruled that a violation of the United States Constitution could be dismissed by a California court as harmless. *People v. Parham*, 60 Cal.2d 378, 385-86, 33 Cal. Rptr. 497, 384 P.2d 1001 (1963), cert. denied, 377 U.S. 945 (1964). It thereupon affirmed the defendant's conviction for burglary and held that the evidentiary offer and use of the bloody fragments of a check that the police had brutally clubbed and choked out of the defendant in violation of the United States Constitution were nothing more than harmless blunders by the prosecution and the trial court.

Since the *Parham* case, there has been a parade of California cases sustaining convictions despite the use at trial of evidence unconstitutionally obtained in violation of the principles of *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Escobedo v. Illinois*, 378 U.S. 478 (1965), and despite unconstitutional comments on the defendant's failure to testify. *Griffin v. California*, 380 U.S. 609 (1965). The cases include the instant one and are described in Appendix A.

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ARGUMENTS TO VOTERS, BEFORE ADOPTION ON OCTOBER 10,  
1911 OF HARMLESS ERROR RULE OF CALIFORNIA CONSTITUTION,  
ARTICLE VI, SECTION 4½.

*Statement of State Senator A. E. Boynton, Author of the  
Proposed Amendment:*

The object of this amendment is to enable our courts of last resort to sustain verdicts in criminal cases unless there has been a miscarriage of justice, or, putting it in another way, its purpose is to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors. It is designed to meet the ground of common complaint that criminals escape justice through technicalities. It will be noticed that the amendment provides that no new trial shall be granted in a criminal case unless on an examination of the entire case (including the evidence) the error has resulted in a miscarriage of justice. The necessity for this amendment lies in the fact that the constitution of California gives the courts of appeal and the supreme court jurisdiction, in criminal cases on appeal, on questions of law only. The reviewing power does not extend to questions of fact. In order to enable the higher courts to determine whether the errors committed by the trial court resulted in a miscarriage of justice, they must have the power to review the facts of the particular case.

The American Bar Association has endorsed a proposed congressional enactment governing procedure in federal

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courts, which is practically the same as our proposed constitutional amendment, except that it would apply to civil as well as criminal cases. One of the branches of congress has already acted favorably upon such a bill. As was pointed out by Judge Curtis H. Lindley of San Francisco, in a recent address, the adjective branch of our law has not kept pace with the development of substantive law. The trial of a criminal is so hedged about with technicalities that it has grown almost impossible to convict one whose wealth is sufficient to enable him to employ counsel skilled in the technique of criminal law. Thus there has grown up two systems of law—one for the poor, the other for the rich. The pauper prisoner is subjected to the iniquities of the "third degree" to secure from him incriminating evidence, while the wealthy one is surrounded by a corps of defenders, whose skill in barricading their client behind technicalities is usually commensurate with the fees secured.

At the present time a trial judge is virtually nothing more than a referee. He exists merely for the purpose of seeing that contending counsel play the game according to technical rules, and like any contest of skill, victory comes to the advocate who is the best player. The duty of the trial judge is to proceed with the cause; he has no time to investigate numerous points of detail, and, naturally, during the course of a long trial he falls into some small error of procedure. When the appellate court at its leisure, and with the aid of partisan counsel, ferrets out the error, the case is reversed. Under the present conditions lawyers try their cases not so much on their actual merits, as to force technical errors in to the record. The reversal of the just conviction of a guilty man upon purely technical points is the prime cause of want of confidence in our courts. This want of confidence often results in mob violence on the part of a long suffering and outraged public. When a peculiarly atrocious crime has been committed the people have more faith in their own ability to cope with the situation, than in leaving it to the courts, to either reverse a conviction

on appeal, or delay execution so long that punishment is no longer a deterrent. In the English colonies not one criminal in the last seventy-five years has been snatched from the hands of the law. We have long since passed the day when it was possible to convict an innocent man; the problem which confronts us to-day is whether we can convict a guilty one. The absurd lengths to which courts have gone in the reversal of cases for immaterial errors is shown by the recital of a few examples:

In Missouri a case was reversed and the prisoner escaped conviction because the indictment alleged the deceased "instantly died" instead of charging according to the ancient formula that he "did then and there die." In a Texas case the elimination of the letter "r" from the word "first" saved a murderer from the gallows, when his guilt was absolutely determined. In our own state a conviction for murder was set aside because the indictment failed to state that the man killed was a human being.

Under the present system the expense of trying criminals is largely in excess of what it should be. This results from the frequent appeals and reversals of the decisions of the trial courts, and because of the great length of the record, due to the unnecessary and superfluous rulings which the trial judge is forced to make against the people and in favor of the accused, in his endeavor not to commit error that can be made the subject of appeal. It is always the chief aim of the attorneys for the defense to "get error into the record" for the sole purpose of securing a new trial or reversal on appeal. This fosters a spirit of contention in the trial of criminal cases, which draws the mind of the jury from the real issues. The adoption of the proposed constitutional amendment would remove these defects by eliminating the cause of frequent appeals. It would allow the appellate court to look at the facts of the particular case unhampered by any presumption or fiction, to see whether or not the accused was unjustly convicted. Justice and not the means of securing it, would be the object of investigation in such appeal. Judges would be enabled to rule im-

partially on points presented, secure in the knowledge that any immaterial errors not affecting the cause would be disregarded on appeal. By enabling the appellate courts to reverse a case only when injustice has been done by the verdict, a common-sense basis of appeal would be established and public confidence restored. Criminals knowing that one of the most fruitful sources of escape from the clutches of the law has been cut off, would hesitate before committing crime. The increase of crime would thus be checked, the number of appeals would be greatly reduced, the expense of trying cases would be greatly lessened, the culprits would be punished swiftly and with certainty. Similar legislation has already been adopted in New York, Wisconsin, and Oklahoma.

The proposed constitutional amendment was unanimously adopted by the California legislature. If it is adopted by the people it will go far toward improving our system of criminal procedure.

*Statement of State Senator E. S. Birdsall:*

This amendment, commonly called the Boynton amendment, is designed to render it impossible for the higher courts to reverse the judgments of our trial courts in criminal cases for unimportant errors. It is designed to meet the ground of common complaint that criminals escape justice through the technicalities of the law. It will be noticed that the amendment provides that no new trial shall be granted in a criminal case unless on an examination of the entire case (including the evidence) the error has *resulted* in a miscarriage of justice. The rule in California in the past has been that an error, committed in the course of the trial, must be presumed to have been prejudicial and a new trial must be granted, it matters not how guilty the party may be, and oftentimes when the result would have been exactly the same if the error had not been committed.

This amendment would permit a new trial only when the error itself *results* in a miscarriage of justice. The supreme court has held in 21 Cal. 344 that it is a fatal omission

to fail to state in an indictment for robbery that the property taken is not the property of the person charged, although the very word "robbery" itself conclusively implies this. In 56 Cal. 406 a conviction was set aside because the letter "n" was accidentally omitted from the word "larceny," though it is probable that no person in the wide world could have had any doubt as to the word intended. In 137 Cal. 590 a conviction for murder was set aside because the indictment failed to state that the man killed was a human being. In 62 Cal. 309 a conviction of murder was reversed because the trial court permitted a surgeon who had examined the wounds to testify as to the probable position of the deceased when the fatal shot was fired. This was in line with the doctrine announced in 47 Cal. 114 that "every error in the admission of testimony is presumed to be injurious unless the contrary clearly appears." Trial judges of long experience declare that it is almost wholly beyond human skill for the most able and conscientious judge, in the course of a long and busy trial extending over days or weeks to avoid trifling inaccuracies now and then in the thousand and one rulings that they are compelled to make on the spur of the moment.

The object of the amendment is to cure all such inaccuracies, and compel decisions in accord with the actual justice of each particular case. The greatest injury arising from the present system is not the technical reversals, but it is the constant burden under which trial courts labor, by reason of the technical rule above stated. Every judge knows that a new trial always means great expense and generally ends in an acquittal. They are, therefore, compelled, in order to save some justice for the people, to rule almost every point unfairly against the people and in favor of the accused.

This amendment would be a great help in the administration of the law by enabling judges to rule as freely in behalf of one side as the other, and in its fairness stop the growing impression that our judicial decisions are based on technicalities, and not on justice.

